

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

ORIGINAL

75135003

In the Matter of

INTERMODAL FREIGHT FORWARDING, INC.,

Bankrupt-Appellee,

ROBERT J. PIEROT,

Appellant.

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF NEW YORK

APPELLEE'S BRIEF

LEINWAND, MARON, HENDLER & KRAUSE  
Attorneys for Appellee  
Office & Post Office Address  
10 East 40th Street  
New York, New York 10016  
Telephone: (212) 686-8040



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## CITATIONS

### Statutes

#### Bankruptcy Act

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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In the Matter of

INTERMODAL FREIGHT FORWARDING, INC.,

Docket No. 75 B 5003

Bankrupt.

ROBERT J. PIEROT,

Appellant

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BRIEF OF HARRIS D. LEINWAND, TRUSTEE  
IN BANKRUPTCY, APPELLEE, IN SUPPORT  
OF JUDGE STEWART'S AFFIRMATION OF  
BANKRUPTCY JUDGE HERZOG'S ORDER

Preliminary Statement

An order was entered on February 25, 1974 by Bankruptcy Judge Asa S. Herzog that the Bankrupt by Robert J. Pierot prepare, make oath to and file schedules of assets and liabilities and statement of affairs in the form prescribed by the United States Supreme Court as required by §7a(8) of the Bankruptcy Act on or before March 20, 1974 and that Robert J. Pierot be designated to perform the duties imposed on the Bankrupt by the provisions of §7 of the Bankruptcy Act.

On May 15, 1974, the appellant moved to vacate the ex parte order of February 25, 1974. The Trustee served and filed his answer to said motion and a hearing took place on said motion on May 23, 1974. Bankruptcy Judge Asa S. Herzog at said hearing



denied the motion to vacate the order of February 25,1974 and gave Mr. Pierot an additional thirty days to file schedules and a statement of affairs of the Bankrupt.

An order of Bankruptcy Judge Asa S. Herzog dated May 28, 1974 was entered denying the motion dated May 15,1974 for an order vacating and setting aside the ex parte order of February 25,1974 which pursuant to Bankruptcy Act §7b and Bankruptcy Rule 901 (6) (b) designated Robert J. Pierot to file schedules and a statement of affairs of the Bankrupt. On June 5,1974 Appellant served and filed a notice of appeal from said order.

On January 8,1975, District Judge Charles E. Stewart affirmed the order dated May 28,1975 of Bankruptcy Judge Asa S. Herzog denying a motion to vacate the ex parte order entered on February 25,1974 designating Robert J. Pierot as the one to perform the duties of the Bankrupt pursuant to §7b of the Bankruptcy Act (11 U.S.C. §25b).

On February 7,1975 Appellant appealed from the order of Honorable Charles E. Stewart dated January 8,1975.

This brief is submitted in support of the aforesaid decision of Honorable Charles E. Stewart dated January 8,1975 affirming the order of Bankruptcy Judge Asa S. Herzog.

#### Statutes Involved

Section 7 of the Bankruptcy Act (11 U.S.C. §25) provides

in pertinent part:

"Sec.7. Duties of Bankrupts. a. The bankrupt shall . . . (2) comply with all lawful orders of the Court;

. . .

(8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their residences or places of business, if known, or if unknown that fact to be stated, the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated, or disputed; and a claim for such exemptions as he may be entitled to; all in triplicate, one copy for the clerk, one for the referee, and one for the trustee: Provided, however, That the court may for cause shown grant further time for the filing of such schedules if, with his petition in a voluntary proceeding or with his application to have such time extended in an involuntary proceeding, the bankrupt files a list of all such creditors and their addresses;

(9) file in triplicate with the court at least five days prior to the first meeting of his creditors a statement of his affairs in such form as may be prescribed by the Supreme Court;

(10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate...;

b. Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this Act."



## Bankruptcy Rules Involved

### Rule 108.

"(a) Schedules and Statement Required. The bankrupt shall file with the court schedules of all his debts and all his property and a statement of his affairs..."

### Rule 402. Duties of Bankrupt.

"In addition to performing other duties prescribed by these rules, the bankrupt shall ... (4) if the court directs, file a statement of the executory contracts, including unexpired leases, to which he is a party."

### Rule 901. General Definitions.

. . .

"(6) "Bankrupt." When any act is required by these rules to be performed by a bankrupt or when it is necessary to compel attendance of a bankrupt for examination and the bankrupt is not a natural person: (A) If the bankrupt is a corporation, "bankrupt" includes, if designated by the court, any or all of its officers, members of its board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control; ... "

### Statement of Facts

On August 8, 1973 Intermodal Freight Forwarding, Inc. executed an assignment for the benefit of creditors to Conrad B. Duberstein as Assignee which was duly filed with the Clerk of the County of New York on the same day. Pursuant to an involuntary petition in bankruptcy filed against Intermodal Freight Forwarding, Inc. on December 6, 1973, it was adjudicated a Bankrupt on December 26, 1973. A list of creditors of the Bankrupt was filed with the Bankruptcy Court by

the Assignee for the benefit of creditors of Intermodal Freight Forwarding, Inc. on December 10, 1973.

The first meeting of creditors of the Bankrupt was noticed for January 31, 1974. No one representing the Bankrupt appeared. The Court designated Philip Visser as the person to file on behalf of the Bankrupt the Corporation's schedules and statement of affairs after his name was the only one mentioned by Conrad B. Duberstein as an officer of the Bankrupt (10,11).

On February 6, 1974, an ex parte order was obtained designating Philip Visser as the individual to file schedules of assets and liabilities and the statement of affairs of the Bankrupt and to carry out the duties of the Bankrupt pursuant to §7b of the Bankruptcy Act (13,14).

On February 11, 1974, a copy of said order was served by certified mail on Philip Visser at 29 Fenimore Road, Scarsdale, N.Y. Mrs. Philip Visser contacted the attorneys for the Trustee in Bankruptcy and notified them that her husband would be out of the country for six months and therefore would not be able to file schedules pursuant to said order. Through conversations with Mrs. Philip Visser, Otterbourg, Steindler, Houston & Rosen, attorneys for the assignee for the benefit of creditors of the Bankrupt (10), Farber & Childs, Esqs., the attorneys for Philip Visser and the apparent attorneys for the Bankrupt, and others, the attorneys for the Trustee discovered that Robert J. Pierot was a Vice-President, director and controlling stockholder of the Bankrupt,



and that he was the individual who should be designated under §7b of the Bankruptcy Act to perform the duties of the Bankrupt. Therefore the attorneys for the Trustee believed it would be more reasonable to have Robert J. Pierot a controlling stockholder, officer and director of the Bankrupt be designated by the Court to perform the duties of the Bankrupt pursuant to provisions of §7b of the Bankruptcy Act and obtained an ex parte order dated February 25, 1974 so designating him (15,16).

A copy of said order was served by mail upon Robert J. Pierot. Mr. Pierot then mailed said order to Fisher, Axenfeld & Bersani, his attorneys.

On March 6, 1974, an adjourned first meeting of the creditors was held. Mr. Pierot did not appear although his attorneys appeared at the said adjourned first meeting. At said first adjourned meeting, at the suggestion of the Trustee, the time for Mr. Pierot to file schedules was extended to April 10, 1974 from the date of March 20, 1974, set in the order of February 25, 1974 (19,20,21).

The Court pointed out to the attorneys for Mr. Pierot that he is an officer and controlling stockholder of the Corporation and as the one designated to perform the duties of the Bankrupt would have to file schedules although this might impose a burden on him even if he were not personally familiar with the functions of the Corporation (20).

On March 14, 1974, the attorneys for Robert J. Pierot wrote the Trustee herein asking him to advise them of the whereabouts of

the Bankrupt's books and records so that they might prepare schedules of assets and liabilities and statement of affairs.

Said letter states that Mr. Pierot can not comply with the order on or before March 20, 1974. However, on March 6, 1974, the Trustee had obtained an extension to April 10, 1974 for the filing of schedules (19, 20, 21).

On May 15, 1974, the Appellant moved to vacate the ex parte order of February 25, 1974 (26-31). The Trustee served and filed his answer to said motion and a hearing took place on said motion on May 23, 1974 (32, 33). At a hearing on May 17, 1974, Bankruptcy Judge Herzog to dispel any claim of unfairness granted the Appellant until June 16, 1974 to file schedules (25). The attorneys for the Trustee showed the necessity for the filing of schedules in this case. The attorneys for the assignee for the benefit of creditors and others had stated there were no assets in the estate and already over \$100,000.00 had been obtained. It was essential to get a quick complete picture of the assets and liabilities of the bankrupt (25). The attorneys for the Appellant stated in Bankruptcy Court on May 23, 1974 that an order of February 25, 1974 designating the Appellant to perform the duties of the Bankrupt was reiterated by Bankruptcy Judge Herzog at two adjourned first meetings subsequent to the entering of the order with the further direction that if said schedules were not filed the Appellee should apply for an order holding the Appellant in contempt of Court (39, 40). Bankruptcy Judge Herzog at said hearing denied the motion to vacate the order of February 25, 1974 and granted Mr. Pierot an additional thirty days to file



schedules and statement of affairs of the Bankrupt (44). At said hearing the Trustee again reiterated that the books and records were available to Mr. Pierot and handed the attorney for Mr. Pierot a schedule of the location of said books and records showing that the check books, corporate records, general ledger and payroll records were with J.K. Lasser & Company, the other books and records were with Tambini Storage Warehouse, Inc., 137 Carlton Avenue, Brooklyn, N.Y. 11205, the accounts receivable records were with Seair Consultants, Inc., 276 Fifth Avenue, New York, N.Y. and the customers files and corporate records were with David Strauss & Co. Inc., 150 West 28th Street, New York, N.Y. (40,41). The Trustee also listed the location of the books and records in cities other than New York dealing with custom entries and other matters for said cities. This information had been given to the attorney for Mr. Pierot prior to said date. The Trustee offered to have all the books and records located in New York brought to one place if the Court so desired (41). Judge Herzog found that the books and records were available to Mr. Pierot and that even if he were not familiar with the operations of the Bankrupt he was properly designated to file the schedules and statement of affairs on behalf of the Bankrupt and that he was not entitled to a preliminary hearing for the entry of the order of February 25, 1974, and granted the Appellant an additional thirty days to file schedules and a statement of affairs of the bankrupt (43,44).

An order of Bankruptcy Judge Asa S. Herzog dated May 28, 1974 was entered denying the motion dated May 15, 1974 for an order

vacating and setting aside the ex parte order of February 25, 1974 which pursuant to Bankruptcy Act §7b and Bankruptcy Rule 901 (6) (b) designated Robert J. Pierot to file schedules and statement of affairs of the Bankrupt (43).

The Trustee mailed a copy of the order of May 28, 1974 to Appellant's attorneys on May 30, 1974. On June 5, 1974 Appellant served and filed a notice of appeal from said order. On May 30, 1974, the Trustee wrote the attorneys for Appellant again reiterating that he did not wish to harass Appellant.

On June 5, 1974, Appellant's attorneys again wrote stating they did not receive information regarding the whereabouts of the books and records of the Bankrupt until March 26, 1974, when they were ordered to comply with the filing of schedules prior to March 20, 1974. They repeatedly made this statement although the time to file schedules had at that point been adjourned to April 10, 1974 and the whereabouts of the books and records had been told to them again and again despite the fact that they had stated that Appellant would not concede that he was required to file schedules. Appellant's attorneys requested that all the books of the Bankrupt in New York City be brought to one place; that they be brought to a designee of Mr. Pierot on evenings and/or Saturdays. In addition, applicant's attorneys insisted that they were still contesting the requirement that Appellant file schedules and statement of affairs and were appealing from the order of May 28, 1974. On June 10, 1974, the Trustee tele-



phoned Appellant's attorneys and stated that although he did not believe he was required to do so he would bring all the books and records in New York City to one place if the Appellant was really willing to file schedules and statement of affairs of the Bankrupt. The Trustee pointed out that he now believed that Appellant and his attorneys were merely trying to obfuscate the situation and impose burdens on the Trustee. The Trustee was willing to accept some of those burdens if Appellant was willing to file schedules and a statement of affairs of the Bankrupt as is required by law. However, Appellant's attorneys reiterated that the Appellant would not file schedules and a statement of affairs but would rather proceed with its appeal from the order directing Appellant to file said schedules and statement of affairs.

The attorneys for the Trustee did not accept a burden (to make books and records of the Bankrupt available on evenings and weekends) not imposed upon them by law when the acceptance of said burden would not be fruitful as the attorneys for the Appellant had made clear that the Appellant would not file schedules and a statement of affairs but would proceed with its appeal from the order of Bankruptcy Judge Herzog requiring the Appellant to file said schedules and statement of affairs. At all times, the Trustee has made all the books and records of the Bankrupt available to the Appellant. The Trustee offered to bring the essential books and records of the Bankrupt in one place. However, he did not do so when he was informed that even if he did, the Appellant

would not file a schedule and statement of affairs, but would appeal from the order of Bankruptcy Judge Herzog requiring him to do so.

The Trustee in Bankruptcy wished to create an estate and needed funds to defray immediate expenses. There were numerous accounts receivable to collect but American Mail Lines, Ltd. claimed a lien on all the accounts receivable of the Bankrupt. The Trustee wished to be able to collect as many accounts receivable as possible, find and liquidate other assets of the Bankrupt and close the estate as quickly as possible. Such action could only be taken when the conflicting claims of American Mail Lines, Ltd. and the estate to the assets involved were settled.

The attorneys for the Trustee obtained an order dated May 22, 1974 directing that a meeting of creditors be held on June 17, 1974 to consider the compromise of the claim of American Mail Lines, Ltd. At said hearing on June 17, 1974 (Supplemental Record on Appeal, Document 31), Bankruptcy Judge Herzog approved the settlement and thereafter entered an order dated June 24, 1974.

The attorneys for the Trustee obtained an order dated August 24, 1974 authorizing Seair Consultants, Inc. to act as collection agent for the Trustee and American Mail Lines, Ltd. (Supplemental Record on Appeal, Document 33).

The attorneys for the Trustee obtained an order dated September 30, 1974 authorizing the retention of Mandel & Grunfeld ,



Esqs., as Special Customs attorneys for the Trustee to help him resolve the myriad problems concerning U.S. Customs and the Bankrupt's customers, and to reduce claims of U.S. Customs against the Bankrupt and possibly obtain refunds from U.S. Customs on behalf of the Bankrupt. (Supplemental Record on Appeal, Document 34).

#### Summary of Argument

The Appellant concededly is an officer (i.e., the Vice-President), director and controlling stockholder of the Bankrupt. §7b of the Bankruptcy Act and Bankruptcy Rule 901 (6) clearly empower the Bankruptcy Judge to designate an officer or director or controlling stockholder of the bankrupt to perform the duties of the bankrupt. Therefore, Bankruptcy Judge Herzog has three separate, sufficient, independent grounds to designate the Appellant to perform the duties of the Bankrupt.

An individual by freely choosing to become an officer or director or controlling stockholder of a corporation becomes subject to certain duties including those imposed by §7b of the Bankruptcy Act and Bankruptcy Rule 901 (6). Analogously, in most instances, the officer, director, or controlling stockholder is not liable for the debts of the corporation but under various statutes is personally liable and in some instances criminally liable for wages and taxes owed by the corporation with which they are associated. Officers, directors and controlling stockholders of

corporations must accept the duties imposed upon them by law although the fulfilling of said duties might require the expenditure of time and money. This imposition is not a deprivation of the individual's liberty and property without due process of law.

The order designating an individual under §7b of the Bankruptcy Act may be an ex parte order because the Bankruptcy Court has the power to designate any and all officers, directors or controlling stockholders of the Bankrupt under §7b of the Bankruptcy Act. Analogously, the Internal Revenue Service or an employee may pursue any and all officers, directors or controlling stockholders of the corporation for withholding taxes or wages due them from the said corporation. Another reason an ex parte order is used to designate an individual under §7b of the Bankruptcy Act is to obtain a speedy, efficient marshalling and liquidation of assets. Unfortunately, in the case at Bar, a year and a half of delay has required the Trustee and his attorneys to administer this estate as best they could without the advantages of the information normally provided by schedules of assets and liabilities of the Bankrupt and a statement of affairs of the Bankrupt. The Appellant has caused delays by obfuscation and appeal. He claims lack of access to the books and records of the Bankrupt despite repeated written granting of access to same and assurance from the Court that he would have same. He stated he did not have personal knowledge of the affairs of the Bankrupt but it was pointed out that this, even if true, was not relevant and that the oath to the schedules and statement of affairs may be upon information and belief. Besides, no better



suited individual was available.

Often, as in the case at Bar, each officer, director or controlling stockholder points his finger at another as the one who is most appropriate to perform the duties under §7b of the Bankruptcy Act. The Court and the Trustee make their best fair-minded judgment as to whom should be designated but cannot countenance delays caused by the squabbling of various individuals scurrying from the task imposed upon them by law. In the case at Bar, the Appellant is clearly the most appropriate individual to be designated under §7b of the Bankruptcy Act. He is not only an officer but a director and a controlling stockholder of the Bankrupt also. In addition, there is no one else as appropriate to have designated as the president is permanently employed in Europe. Anyone else would be more justified than the Appellant in refusing to file schedules and a statement of affairs of the Bankrupt.

The Appellee, in the case at Bar, had no connection with the Bankrupt prior to its filing an assignment for the benefit of creditors. He had no reason to harass or burden any of the shareholders, directors or officers of the Bankrupt or to favor any of them. His only interest was in having the Court designate the most appropriate individual. The Appellee and the Bankruptcy Judge bent over backwards to be fair to the Appellant, giving him numerous opportunities to be heard and make his case. He was granted numerous extensions of time to file schedules and a statement of affairs of the Bankrupt. The

Court and Appellee assured Appellant he was entitled to and would receive access to the books and records of the Bankrupt.

POINT I

THE BANKRUPTCY ACT AND RULES EMPOWER THE BANKRUPTCY COURT TO DESIGNATE AN OFFICER, DIRECTOR OR CONTROLLING STOCKHOLDER TO FULFILL THE DUTIES OF THE BANKRUPT ENUMERATED IN §7 OF THE BANKRUPTCY ACT (11 U.S.C. §25)

Section 901 (6) of the Bankruptcy Rules reads:

"Bankrupt." When any act is required by these rules to be performed by a bankrupt or when it is necessary to compel attendance of a bankrupt for examination and the bankrupt is not a natural person: (A) if the bankrupt is a corporation, 'bankrupt' includes, if designated by the court, any or all of its officers, members of its board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control."

There is no requirement that an order designating the officer, controlling stockholder or director of a bankrupt corporation be on notice to said individual so designated. In the case at Bar, notice of the ex parte order was given to the Appellant and his attorneys and attorneys for Appellant argued on behalf of Appellant before Bankruptcy Judge Herzog that Appellant was a proper person to be so designated on three separate grounds. He was a controlling stockholder, an officer and a director. The question of whether or not he was familiar with the affairs of the Bankrupt was not relevant. The directors and officers of a corporation, by holding said positions, incur certain



obligations. In addition, as a large investor in the Bankrupt, Appellant incurred further obligations. It is because the Bankruptcy Court has the power to designate an officer, director or controlling stockholder regardless of whether or not he is fully familiar with the affairs of the Bankrupt that an order so designating him is made in an ex parte form.

The Bankruptcy Act and Rules stress the importance of the early filing of schedules of assets and liabilities of the bankrupt and a statement of affairs of the bankrupt. The duties of the bankrupt to file schedules of its assets and liabilities, a statement of its affairs, and a statement of its executory contracts and to comply with orders of the Court, and to submit to an examination with regard to the bankrupt and the administration of the estate, are clearly provided for in §7 of the Bankruptcy Act and Bankruptcy Rules 108 and 402 as follows:

"Sec.7. Duties of Bankrupts. a. The bankrupt shall...(2) comply with all lawful orders of the Court;

. . . .

(8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their residences or places of business, if known, or if unknown that fact to be stated, the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated, or disputed; and a claim for such exemptions as he may be entitled to; all

(Continued)

in triplicate, one copy for the clerk, one for the referee, and one for the trustee: Provided, however, That the court may for cause shown grant further time for the filing of such schedules if, with his petition in a voluntary proceeding or with his application to have such time extended in an involuntary proceeding, the bankrupt files a list of all such creditors and their addresses;

(9) file in triplicate with the court at least five days prior to the first meeting of his creditors a statement of his affairs in such form as may be prescribed by the Supreme Court;

(10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the stration and settlement of his estate...;

b. Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this Act."

Rule 108:

(a) Schedules and Statement Required. The bankrupt shall file with the court schedules of all his debts and all his property and a statement of his affairs..."

Rule 402. Duties of Bankrupt.

"In addition to performing other duties prescribed by these rules, the bankrupt shall ...

(4) if the court directs, file a statement of the executory contracts, including unexpired leases, to which he is a party."



Said duties were not met by Appellant. He did not file schedules of the Bankrupt's assets and liabilities, a statement of its affairs or statement of its executory contracts. He submitted to an examination on December 4, 1974 (Supplemental Record on Appeal, Document 32). At said hearing, he stated he was connected with the Bankrupt from its inception as an officer and director and that he and his brother were its only stockholders. He was authorized to sign checks on behalf of the Bankrupt. He and his brother invested over a quarter of a million dollars. But Appellant testified he did not have any idea what amount of accounts receivable of the Bankrupt were collectible and which of the creditors of the Bankrupt were secured. He stated even after he learned the Bankrupt was hopelessly insolvent he relied completely on the individual who brought it to that state and even then did not examine into the affairs of the Bankrupt. The Appellant's testimony, at his examination, lacks the credibility to be considered as fulfilling the duties imposed under Bankruptcy Rule 205.

The importance of filing schedules is shown by §39a(2) of the Bankruptcy Act which provides:

§39. Duties of Referees. a. Referees shall...  
(2) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts or cause the same to be done when the bankrupts fail, refuse, or neglect to do so;"

This has been changed by Bankruptcy Rule 108d, which substitutes the Trustee rather than the Referee as the one to file schedules if they are not filed by an officer, director or controlling stockholder.

Rule 108d:

"(d) Preparation of Schedules or Statement of Affairs on Default by Bankrupt. If the schedules or statement of affairs is not prepared and filed as required by this rule, the court may order the receiver, trustee, a petitioning creditor, or other party in interest to prepare and file any of these papers within such time as the court shall fix."

The Bankruptcy Act and Rules also stress the importance of a prompt filing of schedules, statement of affairs and statement of executory contracts by the Bankrupt. Bankruptcy Rule 108b grants the involuntary bankrupt ten days after adjudication to file schedules and a statement of affairs and authorizes the Court to grant a ten day extension upon application, with further extensions granted only for cause shown. In the case at Bar, Appellant was granted numerous thirty day extensions. The Appellee was forced to make decisions without the benefit of the information which is normally provided in the schedules, statement of affairs and statement of executory contracts.

The estate cannot be closed and creditors cannot receive dividends until the schedule of assets and liabilities and a statement of affairs are filed. The sooner they are filed the more valuable they are. The longer a delay takes place the more difficult it is to obtain the information and the less valuable said information is.

#### POINT II

APPELLANT'S RIGHTS UNDER THE FIFTH AMEND-  
MENT TO THE UNITED STATES CONSTITUTION WERE  
NOT VIOLATED

Appellant concedes that the Bankruptcy Act and Bankruptcy



Rules clearly state that the Bankruptcy Judge may designate an officer, director or controlling stockholder of a corporation to file a schedule of assets and liabilities and statement of affairs of said corporation. Appellant concedes he is an officer, director and controlling stockholder of the Bankrupt. He even concedes it is normal practice of long standing to use an ex parte order to designate an individual under §7b of the Bankruptcy Act but he contends this practice is violative of the Fifth Amendment of the United States Constitution.

The Bankruptcy Act imposes duties as well as granting benefits. An individual bankrupt obtains a discharge of his debts only when he complies with various provisions of the Bankruptcy Act concerning the keeping of books and records, the lack of fraudulent behavior, the obeying of orders of the Court, and an explanation of the cause of his bankruptcy. Corporate bankrupts also have duties. A corporation acts through individuals and said duties must be fulfilled by individuals. The requirements imposed by §7 of the Bankruptcy Act and the applicable Bankruptcy Rules are necessary for the administration of bankrupt estates and are not violative of an individual's rights under the Fifth Amendment of the United States Constitution.

Appellant uses the fact that an individual can be held in contempt of Court for failure to comply with the duties imposed upon him by §7 of the Bankruptcy Act as grounds to hold that the ex parte order designating Appellant under §7b of the Bankruptcy Act is a deprivation of Appellant's liberty and property without

due process of law. Actually the importance of the filing of schedules and statements of affairs is the reason that an individual may be held in contempt for not filing same.

An individual gains certain benefits by forming a corporation. One of these benefits is that he limits his liability in that most creditors of the corporation do not automatically become creditors of the individual connected with the corporation. However, when the corporation is unable to pay its creditors, certain obligations fall upon officers, directors and controlling stockholders of said corporation. The requirement to fulfill said obligations may take time, effort and money, but this is not a deprivation of the individual's liberty and property without due process of law.

The assignee for the benefit of creditors, the trustee in bankruptcy, the attorneys for the trustee in bankruptcy, the accountants for the trustee in bankruptcy, and the Bankruptcy Judge all have certain functions. Nevertheless, it is not their job to do that which the Bankruptcy Act and Rules clearly require the bankrupt to do. Bankruptcy Rule 108d only imposes the duty of filing schedules and statement of affairs on the trustee or others when they are not filed by the bankrupt.

The order designating an individual under §7b of the Bankruptcy Act may be an ex parte order because the Bankruptcy Court has the power to designate any and all officers, directors or controlling stockholders of the bankrupt under §7b of the Bankruptcy Act. The duties of the bankrupt should be performed



promptly and the Bankruptcy Act wished to avoid time consuming disputes as to who should fulfill the duties of a bankrupt corporation. In the case at Bar, there was every reason for the Court to designate Appellant under §7b of the Bankruptcy Act rather than another officer, director or controlling stockholder. The president, Philip Visser, is permanently employed in Europe. It is reasonable to believe that others who did not have the financial interest that Appellant had in the Bankrupt would be more incensed at their designation and that it would be less fair to designate them. Appellant was a wealthy investor in the Bankrupt. By running his business as a corporation he has benefitted by limiting his liability to the millions of dollars of creditors of the Bankrupt. Insofar as he lacks the necessary information to file schedules and a statement of affairs and statement of executory contracts, he can hire those who have said information or who can obtain same from the books and records. §62a(1) and §64a(1) of the Bankruptcy Act and Bankruptcy Rule 219 may or may not entitle reimbursement for any expenditure by Appellant in fulfilling his duties. Nevertheless, his duty to hire individuals if necessary to fulfill his duty under §7b of the Bankruptcy Act is clear.

Bankruptcy Rule 109 reads as follows:

"Rule 109. Verification of Petitions and Accompanying Papers. All petitions, schedules, statements of affairs, and amendments thereto shall be verified."

Said verification may be upon information and belief. Therefore Appellant may file schedules and statement of affairs even if he does not have personal knowledge of the information contained therein.

The Bankruptcy Court and the Trustee have been extremely fair to Appellant. They have granted him numerous extensions to file schedules and statement of affairs. They have gone out of their way to grant him access at his convenience to the books and records of the Bankrupt. Nevertheless, he has failed and refused to file schedules, statement of affairs and statement of executory contracts of the Bankrupt. The great lengths to which Appellant has gone, including the appeal to this Court, opens the question as to whether there is something he is trying to conceal. This makes it all the more important that he file a schedule, statement of affairs, and statement of executory contracts, and verify same.

After Appellant was designated, there were numerous hearings with regard to the propriety of his designation. He had numerous chances to be heard and the Bankruptcy Court entered additional orders after said hearings which further required Appellant to fulfill the duties of the Bankrupt. Appellant used various smokescreens to avoid filing the schedules, statement of affairs and statement of executory contracts of the Bankrupt. He argued he did not have access to the books and records of the Bankrupt. Bankruptcy Judge Herzog found he did have such access (43,44). He argued that others were better suited than he to be designated and that Mr. Visser, as president of the



Bankrupt should be designated. Bankruptcy Judge Herzog stated that any officer, director or controlling stockholder could be designated by the Court under §7b of the Bankruptcy Act. In addition, Philip Visser is permanently employed in Europe and it would not be appropriate to designate him. At the hearing on December 4, 1974 (Supplemental Record on Appeal, Document 32) Appellant stated he thought Mr. Childs was the attorney for the Bankrupt. Mr. Childs suggested to Appellee that Appellant was the individual best suited to be designated under §7b of the Bankruptcy Act. Even if the Court were constrained only to designate the one best suited, there is no one in the case at Bar better suited than the Appellant.

#### CONCLUSION

The decision of Honorable Charles E. Stewart, dated January 8, 1975, affirming the order of Bankruptcy Judge Asa S. Herzog, denying Appellant's motion to vacate the order of the Bankruptcy Court designating him as the individual to prepare, make oath to, and file schedules of assets and liabilities and a statement of the affairs of the Bankrupt, and otherwise perform the duties of the Bankrupt, should be affirmed.

Respectfully submitted,  
LEINWAND, MARON, HENDLER & KRAUSE  
Attorneys for Appellee  
10 East 40th Street  
New York City, New York 10016  
(212) MU 6-8040

HARRIS D. LEINWAND,  
Of Counsel